IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

UNIFIRST CORPORATION,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	C.A. No. 06-07-003
	)	
HOLLOWAY'S TRUCKING AKA BILL HOLLOWAY'S REPAIR, WILLIAM HOLLOWAY, SR. & SUSAN HOLLOWAY,	)	
Defendants-Appellees.	)	

"J" Jackson Shrum, Esquire, Attorney for Plaintiff.
William M. Chasanov, Esquire, Attorney for Defendants.

Submitted: April 1, 2009
Decided: August 5, 2009

DECISION ON REMAND

On the day of trial of this breach of contract matter, the defendants made an oral motion to dismiss the action for lack of jurisdiction because the terms of the underlying contract called for mandatory, binding arbitration to resolve contractual disputes. Neither party requested a continuance for further time to address the motion, so the Court held an immediate hearing on the motion. After the presentation of evidence and arguments of counsel the Court, applying Delaware law, found and held that the Defendants had not waived the mandatory arbitration provision of the contract, and dismissed the action. Plaintiff appealed to the Superior Court. In that Court, for the first time, Plaintiff contended that this Court erred in applying Delaware law rather than New York law to the issue of

waiver of arbitration. Since this Court "was not directed by the parties to the applicable law of New York," the Superior Court remanded the matter to this Court "for reconsideration of the waiver issue under the New York law."

This Court heard oral arguments on remand on April 1, 2009. After consideration of the arguments, the appellate briefs forwarded on remand, and the record of the original motion to dismiss[1], this Court again grants the motion to dismiss, for the reasons set forth below.

DISCUSSION

The Court first must note that the issue raised on appeal and remanded for consideration was *not* raised by Plaintiff when the Court originally entertained the motion to dismiss. The Court did read aloud the arbitration clause of the contract in the course of the hearing on the motion, including the final sentence of the clause: "This paragraph shall be governed by New York law (exclusive of choice of law)." The Court subsequently proceeded, both in its queries to counsel and in its bench ruling, to apply Delaware law as it formulated its decision from the bench.

At no time during the arguing of the motion or during or after the Court's bench ruling did either party raise the issue that New York law should be applied in deciding the waiver of arbitration issue. Issues not

[1] Although Superior Court Rules require the lodging of a transcript of the proceeding below in an appeal, no transcript was remanded to this Court, and neither party has provided a transcript. The parties were made aware of the lack of a transcript at oral argument, but none has been provided to date. The Court therefore has proceeded, and relied upon, the audio record of the original motion.

raised in the trial court are waived on appeal.[2] Nonetheless, on appeal, both parties apparently agreed that New York law should apply in deciding whether there has been a waiver of arbitration. The Superior Court made no specific holding on the issue.

This Court is not convinced, however, that under the terms of the contract or under choice of law principles, New York law applies in determining whether a Delaware Court has jurisdiction over an action filed in Delaware. If a contract to be interpreted under New York law provides for mandatory arbitration, a Delaware court lacks jurisdiction to hear a claim on that contract unless it finds that the parties have intentionally waived their contractual right to arbitration. Such a waiver, by its nature, occurs outside of the four corners of the contract, by the filing of a non-arbitral proceeding by one party in Delaware and the intentional agreement or accession thereto by the other. All of the acts alleged to amount to a waiver of arbitration are acts that occur within this Delaware forum and through the use of this Court's process; they are not acts of performance or non-performance under the contract. Therefore, the waiver of arbitration, the right to assert it in a Delaware forum, and whether it is sufficient to confer jurisdiction upon a Delaware court, are constructs of Delaware law, regardless of the law the parties chose to

[2] *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980); *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950); *Nanticoke Homes v. Miller*, 2003 WL 22232809 (Del. Super. Sept. 29, 2003); *Small v. MBNA America*, 2008 WL 4365895 (Del. Super. July 7, 2008).

govern the terms *within* their contract. Although the arbitration paragraph of the contract provides that it "shall be governed by New York law," the Court interprets it to mean that New York law shall be applied within the arbitration proceedings and to the terms within the contract, not to whether a litigant may be subjected to the jurisdiction of a Delaware court notwithstanding the arbitration provisions of the contract.

Even if this Court were to apply New York law, it would first apply New York choice of law principles. That jurisdiction holds that "the presence of a choice-of-law provision [in a contract] 'does not automatically settle the choice-of-law question'; while New York courts do generally defer to the choice of law made by parties to an agreement, a court may disregard that choice when another State has the most significant contacts with the matter in dispute."[3] In this case, the pleadings and evidence offered at the motion hearing show that Plaintiff entered into Delaware to solicit and provide uniform rental services to Delaware businesses, including soliciting the defendants' business at their place of business in Lincoln, Delaware. The Plaintiff provided rental uniforms to Defendants at their place of business, and periodically picked up and replaced them with fresh ones. Defendants were invoiced from, and made payments to, appellant's office in Salisbury, Maryland, not New York. The arbitration clause provided that arbitration would be held in

[3] *Nayal v. HIP Network Services, IPA, Inc.*, 2009 WL 1560187 at 4, FN5 (S.D.N.Y) (citing *Cap Gemini Ernst & Young, U.S. L.L.C. v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003)).

Dover, Delaware, not New York. Plaintiff chose to file suit in Delaware. This matter does not appear to have any contacts with New York at all, other than Plaintiff's possible incorporation in that State. I conclude that, under New York choice of law principles, the contract's choice of New York law would be disregarded, and Delaware law would be applied to this matter.

For all of the above reasons, this Court correctly applied Delaware law, rather than New York law, in reaching its prior finding that the defendants had not waived their right to arbitration, despite the parties' apparent agreement on appeal that New York law should apply.

Notwithstanding the appellant's failure to raise the choice of law issue below, and the lack of an actual holding by either Court that New York law should apply to the issue of waiver of arbitration, this Court has been instructed on remand to address the previously un-raised issue and apply New York law. In doing so, the Court will apply New York law only to the facts determined in the original hearing of the motion, and not to any new "facts" asserted in the appellate briefs or oral arguments on remand.[4]

[4] "Appeals shall be heard and determined by the Superior Court *from the record of proceedings below* . . .." Super. Ct. Civ. R. 72(g) (emphasis added); 10 Del. C. § 1326(c). As an appellate court, the Superior Court may not consider facts not on the record below. Any newly raised facts relied upon by the parties in subsequent briefing to the Superior Court would not be considered on appeal as they cannot be used to supplement the record on appeal. The Superior Court remanded the case only for reconsideration of the arbitration waiver issue under New York law. The Superior Court did not remand to the trial court to take additional evidence or to determine the facts in light of new evidence.

After a careful review and comparison of Delaware and New York law regarding waiver of arbitration, the Court finds the law of both jurisdictions to be largely in accord, with one exception. Both States have expressed their public policy in favor of resolving disputes through arbitration.[5] Therefore, both States hold that the waiver of a right to arbitrate requires an intentional relinquishment of the right demonstrated by knowledge of its existence, and actual manifestations of such intent through the actions of the party.[6] Both States look at the same factors to find a manifestation of intentional waiver: The amount of non-arbitration litigation a party has taken to prosecute or defend a claim;[7] whether the party has asserted it will or will not be moving to enforce an arbitration provision;[8] and whether the non-moving party would be prejudiced by an untimely demand for arbitration.[9]

The only possible material difference between the laws of the two States on this issue appears to be the burden of proof. Although both States place the burden of proving waiver

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[5] *Graham v. State Farm Mut. Auto. Ins. Co.,* 565 A.2d 908 (Del., 1989); *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 876 N.E.2d 903, 907 (N.Y. 2007) (quoting *Matter of Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49 (N.Y. 1997)).

[6] *James Julian, Inc. v. Raytheon Serv. Co.,* 424 A.2d 665, 668 (Del. Ch., 1980); *Zurich Insurance Co. v. Evans,* 392 N.Y.S.2d 564, 566 (N.Y. 1977); *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 403.

[7] *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *W.R. Ferguson, Inc. v. William A. Berbusse, Jr., Inc.* 9 Storey 229, 216 A.2d 876 (Del. Super., 1966); *Wilshire Restaurant Group, Inc. v. Ramada Inc.*, 1990 WL 195910 (Del. Ch.); *Zaret v. Warners Moving & Storage* 1995 WL 56708 (Del.Ch.); *Fein v. General Electric Company*, 835 N.Y.S.2d 736, 738 (N.Y. 2007); *Herzog v. Oberlander*, 2008 WL 880184 at 8 (N.Y.Sup. 2008).

[8] *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *Rose Heart, Inc. V. Ramesh C. Batta Associates, P.A.*, 1994 WL 164581 (Del. Super.); *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch., 1980); *The Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745 (Del. Ch.); *Action Drug Co. v. R. Baylin Co.*, 1989 WL 69394 (Del. Ch.); *Herzog v. Oberlander*, 2008 WL 880184 at 8, (N.Y.Sup. 2008); *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 405 (N.Y. 1974)

[9] *Wilshire Restaurant Group, Inc. v. Ramada Inc.*, 1990 WL 195910 (Del. Ch.); *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *Action Drug Co. v. R. Baylin Co.*, 1989 WL 69394 (Del. Ch.); *see Shabbir v. Hussain*, 2008 WL 1724008 at 2 (N.Y. Sup.).

on the party opposing arbitration, Delaware law plainly sets the burden of proof as "clear and convincing."[10] This Court has found no New York case that specifically cites this higher burden of proof. However, New York law, like Delaware's, provides that waiver of arbitration "is not to be lightly inferred"[11] in light of the public policy in favor of arbitration. And it is "because of the policy in favor of arbitration [that Delaware] requires clear and convincing evidence of waiver."[12] Indeed, New York courts hold that "[a]ny doubts as to whether an issue is arbitrable will be resolved in favor of arbitration."[13] Thus the Court is not convinced that New York courts do not, in fact, apply a burden of proof greater than a preponderance of the evidence to the waiver issue.

Even if this Court had applied New York law and a lesser burden of proof to the facts presented to it at the original oral motion to dismiss, it would have reached the same conclusion. The Plaintiff failed to prove defendant's waiver even by a preponderance of the evidence. The Court found the following: Plaintiff had drafted the pre-printed contract in question and had unilaterally included the mandatory arbitration provision. After obtaining the defendant's signature, Plaintiff kept the contract and did not provide defendant with a copy of same. Notwithstanding its own contractual demand for arbitration, Plaintiff instead chose to file suit against Defendant in this forum. The only actions taken by Defendant in this forum were the filing of an answer on August 10, 2006, participation in one pre-trial conference on December 4, 2006, and appearance at the scheduled trial on November 28, 2007 to make its motion to dismiss. There were no formal requests for discovery by either party throughout this litigation, although Defendant informally requested clarification of some invoiced charges in December, 2006. Although there was some lapse of time in rescheduling the trial from the original February, 2007 date, no protracted litigation or related expenses were proven to the Court.

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[10] *Zaret v. Warners Moving & Storage*, 1995 WL 56708, at *1 (Del. Ch. Feb. 3, 1995); *Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch., 1980).
[11] *Rush v. Oppenheimer & Co.,* 779 F.2d 885, 887 (2d Cir.1985).
[12] *Zaret v. Warners Moving & Storage*, 1995 WL 56708, at *1 (Del. Ch. Feb. 3, 1995).
[13] *Smith Barney Shearson, Inc. v. Sacharow*, 91 N.Y.2d 39, 49-50 (N.Y. 1997).

"A party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party."[14] Additionally, although litigation may begin before the request for arbitration, a party is only deemed to have waived arbitration if there has been litigation pertaining to "substantial issues going to the merits."[15] Minor proceedings, such as the filing of original pleadings and motions prior to any significant discovery, are not considered substantial litigation.[16] "[M]erely . . . interposing an answer containing affirmative defenses and . . . submitting affidavits in opposition to the plaintiff's . . . motion" are insufficient to find a waiver of arbitration.[17]

I found, and find, that the amount of non-arbitration litigation the parties had participated in at the time of the motion to dismiss was minimal, did not involve substantial issues going to the merits, and is insufficient to find that defendant's participation in such amounted to an implicit waiver of his right to arbitration, under both New York and Delaware law.

I found, and find, that, by their actions in this matter, the Defendants neither asserted nor implied that they would move to enforce an arbitration provision until their motion on the day of trial. However, Defendants also did not assert or imply any waiver of their right to arbitration by any of their actions in this matter. Although Defendants were not provided a copy of the preprinted contract they signed in November, 2004, a collection letter sent to them on March 8, 2006 did inform them of the arbitration provision of the contract, and unilaterally claimed Defendants' failure to respond within 10 days would be deemed a "refusal to arbitrate." However, Defendants were under no obligation to respond to the letter and their non-response is not a refusal to arbitrate, but merely evidence of Defendants' presumptive knowledge of the right to arbitrate. Defendants have not engaged in any conduct

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[14] *See* *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130 (2d Cir. 1997); *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991).
[15] *Thyssen, Inc. v. M/V Markos N*, 1999 WL 619634, at *8 (S.D.N.Y. 1999).
[16] *Id*.
[17] *BR Ambulance Service, Inc., et al. v. Nationwide Nassau Ambulance, et al.* 542 N.Y.S. 2d 21, 22 (A.D. 2 Dept. 1989).

"clearly inconsistent with [their] later claim that the parties were obligated to settle their differences by arbitration."[18]

The mere lapse of time in an action, when neither party has affirmatively engaged in pleading practice, discovery, or other litigation practices to avail itself of the benefits of this jurisdiction in the interim, does not amount to prejudice. The Court found, and finds, under the laws of both New York and Delaware, that Plaintiff failed to meet its burden of proof of sufficient prejudice to Plaintiff to constitute a waiver of arbitration in this matter, when Plaintiff ignored its own mandatory arbitration terms to file suit here, participated in one pretrial conference, and then appeared on the trial date, with no intervening protracted litigation or even any action by Plaintiff to move the case along. Plaintiff undoubtedly incurred costs in filing suit, and having counsel appear in this forum twice, once for the pretrial conference and then again prepared for trial. It willingly assumed the risk of some of this expense when it filed suit here notwithstanding the terms of the contract it drafted. Plaintiff offered little evidence of prejudice at the hearing of the motion other than the lapse of time from filing to trial and its appearance for trial.

CONCLUSION

For all of the foregoing reasons, the Plaintiff has failed to convince this Court that Defendants should be deemed to have waived the arbitration provision of the contract. New York courts have found no waiver in cases where there was more protracted litigation, and more prejudice to the opposing party, than demonstrated here.[19] And in most of the New York cases reviewed in which a waiver was found, it is clear that the moving party was either more involved in protracted litigation than here, or dismissal was demonstrated to be more prejudicial to the opposing party.[20]

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[18] *Stark*, 876 N.E.2d at 908 (quoting *Flores*, 4 N.Y.3d at 372).

[19] *See, e.g.*, *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir.1985).

[20] *See, e.g., & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir.1998);* [20] *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995); *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993).

Thus, under both New York and Delaware law, the Court finds that waiver of arbitration has not been established. Defendant's motion to dismiss is again **GRANTED.**

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Kenneth S. Clark, Jr.